87-6138

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

WILLIE MACK MODDEN,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Willie Mack Modden, Petitioner, hereby moves, pursuant to Rule 46.1 of the Rules of this Court, for leave to proceed in this Court in forma pauperis. A supporting affidavit is contemporaneously filed in support of this Motion. Petitioner's motions for leave to proceed in forma pauperis were granted by the 217th Judicial District Court of Angelina County, Texas and by the Texas Court of Criminal Appeals.

Respectfully submitted,

HAYNES AND BOONE
3100 First RepublicBank Plaza
901 Main Street
Dallas, Texas 75202-3714
(214) 670-0550

W. Alan Wright
Counsel of Record

COUNSEL FOR PETITIONER

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

WILLIE MACK MODDEN,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

AFFIDAVIT OF WILLIE MACK MODDEN
IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF TEXAS §
§
COUNTY OF WALKER §

Willie Mack Modden, being first duly sworn, deposes and states as follows:

1. I am the Petitioner in the above-styled and numbered cause. In support of my motion to proceed in forma pauperis, I state that, because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor. I believe that I am entitled to redress. I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting my appeal are true.

2. I am currently incarcerated in the Ellis I Unit of the Texas State Prison in Huntsville, Texas, under sentence of death.

3. I am without funds to pursue my appeal. I have the following assets:

a. Business, profession or other form of self-employment:

Yes _____ No X

b. Pensions, annuities or life insurance payments:

Yes _____ No X

c. Rent payments, interest or dividends:

Yes _____ No X

d. Gifts or inheritances:

Yes _____ No X

e. Any other sources:

Yes _____ No X

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months:

_____

_____

4. Do you own any cash, or do you have money in a checking or savings account? Yes _____ No X (Include any funds in any prison accounts) If the answer is yes, state the total value of the items owned:

_____

5. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes _____ No X If the answer is yes, describe the property and state its approximate value: _____

6. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support:

NONE

7. I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Willie M. Modden
WILLIE MACK MODDEN

SUBSCRIBED AND SWORN TO BEFORE ME on this 14 day of December, 1987, to certify which witness my hand and official seal.

NOTARY PUBLIC STATE OF TEXAS

David Perales
Notary Public in and for
the State of Texas

My Commission Expires:
July 1, 1989

David Perales
Notary's Typed or Printed Name

CERTIFICATE

I hereby certify that WILLIE MACK MODDEN has the sum of $.00 on account to his credit at the Ellis I Unit where he is confined. I further certify that, according to the records of the institution, he has the following securities to his credit: None.

DATED this 18 day of December, 1987.

Katherine Caldwell
Authorized Officer of the
Institution

AFFIDAVIT OF WILLIE MACK MODDEN
IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

WILLIE MACK MODDEN,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

W. Alan Wright
Counsel of Record

HAYNES AND BOONE
3100 First RepublicBank Plaza
901 Main Street
Dallas, Texas 75202-3714
(214) 670-0550

December 21, 1987

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I.

Do statements by the prosecutor in closing argument during the punishment phase of a capital murder trial advising the jury that they will not see the defendant die, that they are not killing the defendant and that the jurors themselves are not answering the specific fact questions required by the Texas statutory scheme minimize the jury's sense of responsibility for its role in the sentencing process in violation of the Eighth Amendment and in conflict with this Court's holding in Caldwell v. Mississippi, 472 U.S. 320 (1985)?

II.

Does the use by the prosecution of peremptory challenges and challenges for cause to strike black venirepersons from the jury in the capital murder trial of a black defendant without any explanation or justification for their use violate the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment and conflict with the holding of this Court in Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712 (1986)?

III.

Does the Texas statutory scheme for imposing the death penalty violate the Eighth and Fourteenth Amendments and conflict with the recent holdings of this Court in Sumner v. Shuman, ___ U.S. ___, 107 S.Ct. 2716 (1987), Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982), Hitchcock v. Dugger, ____ U.S. ____, 107 S.Ct. 1821 (1987), and Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. 1669 (1986), by precluding the jury from considering relevant mitigating evidence in the punishment phase of a capital trial?

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

WILLIE MACK MODDEN,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Willie Mack Modden, Petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Court of Criminal Appeals entered on December 17, 1986.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals is reported at 721 S.W.2d 859 (Tex. Crim. App. 1986) and is reproduced in the Appendix hereto at A-1, infra.

JURISDICTION

On direct appeal, the Texas Court of Criminal Appeals affirmed the Petitioner's conviction and sentence of death on December 17, 1986. By its Order issued on or about October 21, 1987, the Texas Court of Criminal Appeals granted Petitioner's Emergency Motion to Recall Issuance of Mandate and to Stay Execution Pending the Filing of an Out of Time Petition for Writ of Certiorari to this Court and ordered, inter alia, that Petitioner's execution, then scheduled for October 29, 1987, be stayed pending the filing of a petition for writ of certiorari on or before December 21, 1987. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

U.S. Const. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

U.S. Const. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const. amend. XIV, §1: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . nor deny to any person within its jurisdiction the equal protection of the laws."

3A Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1981 & Supp. 1987) is set forth in the Appendix hereto at A-2, infra.

STATEMENT OF THE CASE

The Petitioner was convicted in 1986 of capital murder and sentenced to death. During the voir dire examination, prospective jurors were "death qualified" by prosecutorial inquiry into each juror's views on capital punishment and how those views would effect the deliberations of individual jurors. The prosecution exercised nine peremptory strikes, three of which served to eliminate black venirepersons from the venire out of which the jury was ultimately selected. In particular, the prosecution struck black venirepersons Bobby Garrett (Tr. vol. IX, p. 1141), Lanita Diane Dixon (Tr. vol. VIII, p. 948) and Frank Griffin (Tr. vol. XV, p. 1735) without offering any explanation for their exclusion from the jury. Additionally, black venirepersons Margie Nell Kibble (Tr. vol. IV, pp. 326-327), Bonnie Sparks (Tr. vol. IX, p. 1058), Glenn Gamble (Tr. vol. XI, p. 1291), Leon Washington (Tr. vol. XII, p. 1344), and Eva Robinson (Tr. vol. XIII, pp. 1557-1558) were stricken from the venire by the prosecution through challenges for cause. As a result, only one black juror, Tony Curtis Evans, sat on the jury that convicted Petitioner and sentenced him to death. Even though Petitioner objected to the course of the jury selection process before the jury selection was complete and expressed concern to the Court concerning the exclusion of black venirepersons from the jury

(Tr. vol. VII, pp. 772-774), the prosecution offered no explanation for its use thereafter of peremptory strikes and additional challenges for cause to eliminate nine black venirepersons from the jury.

In the closing argument during the punishment phase of the trial, the prosecution told the jurors that they would never see Petitioner die, that they would never be in the position of "plunging a needle into him" and that the answers of the jury to the two special issues submitted to them were "placed there" for them by Petitioner. (Tr. vol. XXVI, pp. 2888, 2889)

During the punishment phase of the trial, Petitioner's counsel introduced into evidence a Psychological Report and testimony by Dr. Joe Kartye as mitigating evidence. (Def. Ex. 3; Tr. vol. XXIII, pp. 2636-2671) On cross-examination by the prosecution, Dr. Kartye admitted that Petitioner was capable of acting deliberately and that, as a result of his prior prison record and limited mental capacity, there was a high probability that Petitioner would engage in future acts of violence. (Tr. vol. XXIII, pp. 2662-2664) Notwithstanding the mitigating evidence introduced through the testimony of Dr. Kartye, the jury unanimously answered "yes" to both special issues submitted and Petitioner was therefore sentenced to death. (Tr. vol. XXVI, p. 2893)

HOW THE ISSUES WERE RAISED AND DECIDED BELOW

On direct appeal, the Petitioner complained of the prosecutor's improper closing argument as violative of the holding of this Court in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985), claiming that the prosecutor's argument improperly led the jurors to minimize the importance of their role in the sentencing process and that the argument "was of such proportions that a timely objection would not have removed it from the minds of the jurors." 721 S.W.2d at 861. The Texas Court of Criminal Appeals overruled Petitioner's challenge, holding that the argument did not invite the jurors to shift the responsibility of determining the appropriateness

of a death sentence elsewhere, that the prosecutor's remarks constituted a correct description of the jury's role in the sentencing process, that the prosecutor's statement was an acceptable response to the argument of opposing counsel, and that the challenged argument was a reasonable deduction from the evidence. 721 S.W.2d at 862.

Petitioner also challenged on direct appeal, on Sixth Amendment grounds, the trial court's failure "to protect the rights of the [Petitioner] from the inherent racial prejudice existing in [Petitioner's] community against a black person defendant and a white person victim." Id. As noted above, Petitioner had brought to the attention of the trial court during the jury selection process his concern that black venirepersons were not being selected for the jury. (Tr. vol. VII, pp. 772-774) The Court of Criminal Appeals overruled Petitioner's objection to the exclusion of all but one of the black members of the jury panel, apparently holding that Petitioner had waived any right to complain of the racial composition of the jury. Id.

The issue of the constitutionality of the Texas death penalty statute, at least as regards the inability of the jury to consider mitigating evidence, was not expressly raised in the trial court by Petitioner. However, the evidence in the record of this proceeding, as will be seen, supports a determination by this Court that the Texas statutory scheme is unconstitutional and should be reconsidered by this Court.

REASONS FOR GRANTING THE WRIT

I.

THE PROSECUTOR'S CLOSING ARGUMENT DURING THE PUNISHMENT PHASE OF THE TRIAL VIOLATED PETITIONER'S EIGHTH AMENDMENT RIGHTS AND WAS IN DIRECT CONFLICT WITH PRIOR HOLDINGS OF THIS COURT.

In the course of his closing argument following the presentation of evidence in the punishment phase of

Petitioner's trial, Mr. Goodwin, the prosecutor, presented the following argument to the jury:

> You answer the questions. You are following the law. You don't say anything about anything, except if these questions are right or wrong. Are they "yes" or "no"?
>
> What happens to him after that, you will never see him. You will never be in a position to see him die, nor will you ever be in the comparable position of plunging a needle into him or stabbing him over and over and over. You are not going to ever get to the point where Willie Mack was. You will never get to that point.
>
> You didn't even, you didn't even answer these questions. You didn't do that. The facts and acts as they were committed answered these questions.
>
> You merely look at the evidence and see the answer that was placed there by you; placed there for you by Willie Mack Modden. And you take those answers and you record them on the paper.

(Tr. vol. XXVI, pp. 2888, 2889)

This argument violates the holding of this Court in Caldwell v. Mississippi, ___ U.S. ____, 105 S.Ct. 2633 (1985) (hereafter "Caldwell"). The prosecutor's argument led the jury to believe that the answers to the special issues were not to be determined by the jury and that, as a result, the jury's responsibility for determining the appropriateness of the death penalty for the Petitioner in this case rested elsewhere. Through such argument, the prosecutor minimized the importance of the jury's role in determining whether the Petitioner received a life sentence or the death penalty.

In Caldwell, this Court considered the prosecutor's closing argument to the effect that the decision of the jury was not the final decision and would be reviewable on appeal. Addressing the Petitioner's claim that an argument seeking to minimize the jury's sense of the importance of this role was violative of the Eighth Amendment, the Court held:

> We conclude that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the

> defendant's death rests elsewhere. . . . [F]or a sentencer to impose a death sentence out of a desire to avoid responsibility for its decision presents the spectre of the imposition of death based on a factor wholly irrelevant to legitimate sentencing concerns. . . . [T]he uncorrected suggestion that the responsibility for any ultimate determination of death will rest will others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

___ U.S. at _____, 105 S.Ct. at 2639, 2641, 2642.

In the instant action, the prosecutor's suggestion that the jury would never be in a position to see Petitioner die, that the jury would never be in the position of "plunging a needle" into Petitioner and that the answers to the special issues submitted to the jury as required by Texas law were "placed there" for the jury by Petitioner strongly suggested to the jury that they would bear no responsibility for answering the special issues in such a manner as to require the imposition of the death penalty.

The prosecutor's argument further suggested to the jury that they would never be in the position of being responsible for Petitioner's death or seeing Petitioner die or "plunging a needle into him" by finding that Petitioner should be put to death by intravenous injection. As previously noted, the prosecutor simply stated: "You will never get to that point." (Tr. vol. XXVI, p. 2888) Furthermore, in his final remarks to the jury, the prosecutor further attempted to relieve the jurors of responsibility for their answers to the special issues, as he stated: "It is just that any lengthy deliberations on this on answering these two questions, is just prolonging the obvious. I don't want you to do it just because I say do it. These two questions are so overwhelmingly and obviously "yes", that I would ask that you go back and answer them both "yes" and do it so quickly, where we can all go home." (Tr. vol. XXVI, p. 2891)

Significantly, none of the above statements by the prosecution in closing argument was cured or corrected by any

instruction from the trial court or further statements from the prosecutor himself. Under the holding of Caldwell, it is apparent that the above comments by the prosecutor were "uncorrected" suggestions relieving the jurors from the responsibility of their decision. Accordingly, Petitioner submits that the prosecutor's argument rendered the sentencing proceeding fundamentally incompatible with the Eighth Amendment's "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" Caldwell, 105 S.Ct. at 2645, citing Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991 (1976) (plurality opinion).

The Texas Court of Criminal Appeals, in reviewing this issue on appeal, stated that, among other reasons, the prosecutor's argument "was an acceptable response to the argument of opposing counsel." 721 S.W.2d at 862. This argument is unavailing, as it directly conflicts with the Caldwell holding. In Caldwell, the objectionable remarks by the prosecution were themselves made in response to the arguments by defense counsel that the jury itself was deciding the fate of the defendant and that such a decision was an awsome responsibility. 105 S.Ct. at 2637. Similarly, in the instant action, Petitioner's trial counsel made the following statement to the jury in closing argument:

> You and you alone can send Willie Mack Modden to lethal injection. There can be no division of responsibility. You can never say that the rest overpowered you individually. In your individual capacity as a juror, it must be your deliberate, cool, premeditated act. It takes your vote.

(Tr. vol. XXVI, p. 2852)

Plainly, the mere fact that the prosecutor's closing argument was or was not "invited" by prior argument of opposing counsel is irrelevant to the determination of whether such argument improperly sought to minimize the jury's sense of the importance of its role. Moreover, the contention by the Court

of Criminal Appeals that the argument was a proper plea for law enforcement or a reasonable deduction from the evidence is of no constitutional significance. Because the prosecutor in the action at bar improperly attempted to assure the jury that it would not be in the position of taking Petitioner's life and that it need not answer these special issues because Petitioner had already answered them, the closing argument by the prosecution constituted constitutionally improper argument.

II.

THE PROSECUTION IMPROPERLY USED PEREMPTORY CHALLENGES AND CHALLENGES FOR CAUSE TO STRIKE BLACK VENIREPERSONS FROM THE JURY PANEL WITHOUT OFFERING ANY EXPLANATION OR JUSTIFICATION THEREFOR IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE SIXTH AMENDMENT AND EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND IN CONFLICT WITH PRIOR HOLDINGS OF THIS COURT.

During the jury selection in this case, the prosecution exercised at least three (3) peremptory strikes as well as at least five (5) of its challenges for cause to eliminate black jurors from the venire out of which the jury was ultimately selected. Of the twelve venirepersons ultimately selected to serve on the jury, only one, Tony Curtis Evans, was black. However, the record in this proceeding is silent as to the reasoning employed by the prosecution in its use of peremptory strikes and challenges for cause to eliminate black venirepersons from the jury. Under such circumstances, Petitioner's conviction should be reversed for a determination of whether the conduct of the prosecution violated Petitioner's rights under the Sixth Amendment and the Equal Protection clause of the Fourteenth Amendment as interpreted by this Court in Batson v. Kentucky, ____ U.S. ____, 106 S.Ct. 1712 (1986) (hereafter "Batson").

In Batson, this Court held that a state denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded. _____ U.S. at _____, 106 S.Ct. at 1716, citing Strauder v. West Virginia, 100 U.S. 303 (1880). In the words of Justice Powell, writing the opinion of the Court:

> Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. . . . Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. [citation omitted] A person's race simply "is unrelated to his fitness as a juror." [citation omitted] . . . The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

106 S.Ct. at 1717-1718.

With regard to the standards for assessing a prima facie case in the context of discriminatory use of peremptory challenges, the Court in Batson held that a defendant may make a prima facie showing of purposeful racial discrimination in jury selection by relying solely on the facts concerning the selection of the jury in his case. Specifically, to establish a prima facie case of purposeful discrimination in selection of the jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial, the defendant must first show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. 106 S.Ct. at 1723. Second, the defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Id., citing Avery v. Georgia, 345 U.S. 559, 562 (1953).

Finally, the defendant must show that the above facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the jury on account of their race. 106 S.Ct. at 1723. Once the defendant makes a prima facie showing, the burden

shifts to the State to come forward with a neutral explanation for challenging black jurors. Id. In this action, there is no evidence in the record of this proceeding or from the statements and questions of the prosecutor during voir dire examination to explain in a neutral manner or any other manner the exclusion of black venirepersons by the prosecution.

In the instant action, although the record in this regard is less than crystal clear, the record does indicate that the prosecution used its peremptory challenges to strike black venirepersons Bobby Garrett (Tr. vol. IX, p. 1141), Lanita Diane Dixon (Tr. vol. VIII, p. 948) and Frank Griffin (Tr. vol. XV, p. 1735) without offering any explanation for their exclusion from the jury. Additionally, black venirepersons Margie Nell Kibble (Tr. vol. IV, pp. 326-327), Bonnie Sparks (Tr. vol. IX, p. 1058), Glenn Gamble (Tr. vol. XI, p. 1291), Leon Washington (Tr. vol. XII, p. 1344), and Eva Robinson (Tr. vol. XIII, pp. 1557-1558) were stricken from the venire by the prosecution through challenges for cause. As a result, only one black juror sat on the jury that ultimately convicted Petitioner and sentenced him to death. Because the record contains no explanation for the conduct of the prosecution in systematically excluding black venirepersons from the jury, there is no explanation in the record for such challenges and the State of Texas cannot meet its burden to show that Petitioner's equal protection rights were not violated.

In Griffith v. Kentucky, ___ U.S. ____, 107 S.Ct. 708 (1987), this Court ruled that the Batson holding applies retroactively to all cases, state or federal, pending on direct review or not yet final when Batson was decided on April 30, 1986. It should be noted that, although the record does not reflect that Petitioner's trial counsel objected to the exclusion of black venirepersons from the jury, Petitioner himself objected to the course of the jury selection process before the jury was sworn, expressing concern to the Court

regarding the exclusion of black jurors at a time in the proceedings when the prosecution had already struck at least one black venireperson from the jury panel for cause. (Tr. vol. VII, pp. 772-774) Of course, as this action was tried in January of 1985, well before the decisions in Batson and Griffith were rendered, Petitioner's trial counsel would have had no reason to object on Batson grounds to the discriminatory use by the prosecution of peremptory challenges or challenges for cause. In any event, under Texas law, all that is required under circumstances such as those presented by the facts of the instant action is that the defendant "present the issue to the trial court." Henry v. State, 729 S.W.2d 732, 734 (Tex. Crim. App. 1987); DeBlanc v. State, 732 S.W.2d 640 (Tex. Crim. App. 1987). Clearly, Petitioner has satisfied this burden.

Where, as here, black jurors were significantly represented in the venire but were noticeably absent from the jury, it cannot be said that their absence had no effect on Petitioner's trial in the Eastern Texas town of Lufkin, particularly in light of the fact that the victim was a white woman and Petitioner is a black man. Because the record in this proceeding provides no insight into the motivations of the prosecution in exercising its peremptory challenges and its challenges for cause to remove black venirepersons from the jury, the judgment of the Court of Criminal Appeals should be vacated and this cause remanded for consideration of such issues.

III.

THE TEXAS STATUTORY SCHEME FOR IMPOSING THE DEATH PENALTY VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BY PRECLUDING THE JURY FROM GIVING MEANINGFUL CONSIDERATION TO MITIGATING EVIDENCE IN THE PUNISHMENT PHASE OF A CAPITAL TRIAL.

Under the Texas statutory scheme in capital murder cases, once a defendant is found guilty of capital murder as defined in Tex. Penal Code Ann. §19.03 (Vernon Supp. 1987), the jury decides whether the defendant will receive a life sentence or

death by answering the three "special issues" listed below:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex. Crim. Proc. Code Ann. art. 37.071(b) (Vernon 1981 & Supp. 1987), set forth in the Appendix hereto at A-2, infra.

Because the evidence did not raise the issue of provocation by the deceased, the third "special issue" was not submitted to the jury in this case. Thus, if the jury unanimously answered "yes" to the first and second special issues, the trial court was required, as a matter of Texas law, to sentence the defendant to death. The jury in the instant action answered the two special issues "yes" (Tr. Vol. XXVI, p. 2893), and Petitioner was accordingly sentenced to death.

The Fifth Circuit has recently questioned the constitutionality of the Texas death penalty statute in light of the developing jurisprudence of this Court in the area. In Penry v. Lynaugh, No. 87-2466 (5th Cir. Nov. 25, 1987) (hereafter "Penry"), Judge Reavley undertook a detailed analysis of the Texas death penalty statute as upheld by this Court in Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950 (1976), in light of the more recent death penalty pronouncements of this Court in Sumner v. Shuman, _____ U.S. _____, 107 S.Ct. 2716 (1987), Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982), Hitchcock v. Dugger, ____ U.S. ____, 107 S.Ct. 1821 (1987), and Skipper v. South Carolina, ____ U.S. ____, 106 S.Ct. 1669 (1986).

Judge Reavley noted that, under Sumner, this Court has held that a sentencing authority must not be precluded from

considering relevant mitigating evidence in the punishment phase of a capital trial. As Judge Reavley stated:

> The Supreme Court has held that presentation of mitigating circumstances to the sentencing authority is not enough: "[n]ot only did the Eighth Amendment require that capital-sentencing schemes permit the defendant to present any relevant mitigating evidence, but 'Lockett requires the sentencer to listen' to that evidence." Sumner v. Shuman, _____ U.S. _____, _____, 107 S.Ct. 2716, 2722, 97 L.Ed.2d 56 (1987) (quoting Eddings, 455 U.S. at 115, n. 10, 102 S.Ct. at 877, n. 10). We read the Court's command that the sentencer not be precluded from "considering" any mitigating circumstance to mean that the sentencer not be precluded from listening to and acting upon any mitigating circumstance. That is not to say that the aggravating and mitigating circumstances must be balanced in any particular way. [citation omitted] It is simply to say that the jury may not be precluded from allowing the evidence of mitigation to enter into their decision.

Penry, No. 87-2466, slip op. at 678, 679 (5th Cir. Nov. 25, 1987) (emphasis supplied).

Under the Texas scheme, the jury is instructed only to answer each of the special issues submitted to them. No jury instruction on mitigating evidence is given to the jury. The Texas Court of Criminal Appeals has held that no such instruction is necessary because the jury "can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence." Penry, slip op. at 679, citing Cordova v. State, 733 S.W.2d 175, 190 (Tex. Crim. App. 1987) (quoting Quinones v. State, 592 S.W.2d 933, 947 (Tex. Crim. App.), cert. denied, 449 U.S. 893 (1980)). Of course, as Judge Reavley noted in Penry, the crucial issue is whether the jury, upon hearing mitigating evidence presented during the punishment phase, has any meaningful opportunity to act on any or all of the mitigating evidence in any manner they choose:

> [I]s the jury precluded from the individual sentencing consideration that the Constitution mandates? The jury may only find whether the murder was deliberate with a reasonable expectation of death and whether there is a probability that the defendant will in the future commit criminal acts of

> violence that constitute a threat to society. Although most mitigating evidence might be relevant in answering these questions, some arguably mitigating evidence would not necessarily be. The jury, then, would be effectively precluded from acting on the latter. Actually, these questions are directed at additional aggravating circumstances. Once found beyond a reasonable doubt, the death penalty is then mandatory. The jury cannot say, based on mitigating circumstances, that a sentence less than death is appropriate. How can a jury act on its "discretion to consider relevant evidence that might cause it to decline to impose the death penalty"? McCleskey, 107 S.Ct. at 1773. Where, in the Texas scheme is the "moral inquiry" of the "individualized assessment of the appropriateness of the death penalty"? Brown, 107 S.Ct. at 841 (O'Connor, J. concurring).
>
> We recognize that Jurek specifically upheld the Texas statute, as the state argues. Developing Supreme Court law, however, recognizes a constitutional right that the jury have some discretion to decline to impose the death penalty. There is a question whether the Texas scheme permits the full range of discretion which the Supreme Court may require. Perhaps, it is time to reconsider Jurek in light of that developing law.

Penry, slip op. at 679, 680 (emphasis in original).

Turning then to the specific mitigating circumstances referred to in Penry, it bears mention that they are strikingly similar to those introduced by the Petitioner in the instant action. Like Johnny Paul Penry, there is substantial evidence that Petitioner is mentally retarded. Indeed, a Psychological Report introduced by Dr. Joe Kartye, a psychologist who examined Petitioner prior to trial and testified during the punishment phase of the trial, noted that Petitioner's full scale IQ was tested at 64 and that Petitioner was "in the mildly retarded range of intellectual functioning." (Def. Ex. 3)

As Judge Reavley observed in Penry, one effect of Penry's retardation was his inability to learn from his mistakes. Similarly, Dr. Kartye noted in his Psychological Report in this action that Petitioner "lacks the cognitive and behavior controls necessary to effectively regulate his behavior."

(Def. Ex. 3) Certainly, this evidence, which is, as the Penry court acknowledged, similar to that offered in Hitchcock and Eddings, is required to be considered by the sentencer. Yet, under the Texas scheme, there is no mechanism to allow the jury to give meaningful consideration to the evidence. As Judge Reavley observed:

> Yet the Penry jury was allowed only to answer two questions. First, was the killing deliberate with reasonable expectation of death. Having just found Penry guilty of an intentional killing, and rejecting his insanity defense, the answer to that issue was likely to be yes. Although some of Penry's mitigating evidence of mental retardation might come into play in considering deliberateness, a major thrust of the evidence on his background and child abuse, logically, does not. The second question then asked whether Penry would be a continuing threat to society. The mitigating evidence shows that Penry could not learn from his mistakes. That suggests an affirmative answer to the second question. What was the jury to do if it decided that Penry, because of retardation, arrested emotional development and a troubled youth, should not be executed? If anything, the evidence made it more likely, not less likely, that the jury would answer the second question yes. It did not allow the jury to consider a major thrust of Penry's evidence as mitigating evidence. We do not see how the evidence of Penry's arrested emotional development and troubled youth could, under the instructions and the special issues, be fully acted upon by the jury. There is no place for the jury to say "no" to the death penalty based on a principal mitigating force of those circumstances.

Penry, slip op. at 680, 681 (emphasis in part in original and in part supplied).

In this case, Petitioner's counsel introduced the Psychological Report of Dr. Kartye into evidence during the punishment phase of the trial as mitigating evidence. Predictably, on cross-examination, the prosecutor focused Dr. Kartye's attention on the "deliberateness" and "probability of future acts of violence" aspects of the two special issues submitted to the jury. (Tr. vol. XXIII, pp. 2661-2662) Not surprisingly, Dr. Kartye was compelled to admit on cross-examination that Petitioner's mentality, lack of

training, bad background and the like would not preclude him from acting deliberately (Id.) and that, because of Petitioner's prior prison record and his limited mental capacity, there was "a high degree of probability that Willie Mack Modden will continue to be a threat to society and that he will commit criminal acts of violence in the future." (Tr. vol. XXIII, p. 2664) As with the evidence in Penry, the evidence of Petitioner's mental retardation and his inability to effectively regulate his behavior virtually guaranteed a "yes" answer by the jury to the two special issues submitted to them. Far from serving to mitigate the circumstances, such evidence in all likelihood precluded the jury from giving a "no" answer to the second special issue and determined that Petitioner would receive a sentence of death. As the Penry court properly noted, there is simply no place under the Texas statutory scheme for the jury to say "no" to the death penalty.

Indeed, during the voir dire examination of the jurors and during closing argument, the prosecutor continually directed the attention of the jury away from any mitigating factors, as he repeatedly referred to the two special issues that would be submitted by the jury as determinative of whether Petitioner would receive a life sentence or the death penalty and continually advised the jurors that "yes" answers would automatically result in a sentence of death. See, e.g., Tr. vol. VI, pp. 668-671; Tr. vol. VII, pp. 828-831. Throughout his final argument, the prosecutor made reference to the two special issues and even relied on the Psychological Report of Dr. Kartye to show that Petitioner deliberately committed the acts of which he stood accused and that there was a probability of future violent acts by Petitioner. (Tr. Vol. XXVI, pp. 2803-2804, 2875, 2880-2881)

Of course, in his closing argument, the prosecutor ignored the mitigating evidence presented by Petitioner during the punishment phase and instead narrowed the focus of the jury to

the two special issues before them. The following excerpt from the prosecutor's closing argument is typical of the consideration he desired that the jurors give to mitigating evidence:

> Why do you ask me if I believe in the death penalty or don't believe in it, when, really our oath of office and the instructions to us or our oath as a juror is "can we consider these issues? Can we consider them and answer them from the evidence? That is what I would like to do and not get off on all these things."
>
> But think, it is overwhelming through the evidence. What kind of an explanation, and it's part of it -- you want to consider all the evidence? It's part of it when you say three little kids walk up to you and tug on your sleeve and you have to explain to them, "He didn't deliberately do it. He just didn't."
>
> Even though he said he did, we said he didn't. What it is going to take -- let me tell you what it is going to take to keep from both of these answers being "yes". It is going to take, it is going to take a juror who will not follow his oath. It's going to take a juror who raised his hand and can't follow that oath. It is going to take a juror who plants his feet and just says "I am not going to do it. I'm just not going to do it. I told you I would do it, I said I would do it, and I said I could do it, and I said I would listen to the evidence and answer according to the evidence, but there's no way."

(Tr. Vol. XXVI, pp. 2884-2886)

Thus, evidence intended and offered by Petitioner's counsel to serve as mitigating evidence undoubtedly acted in the opposite manner. Unfortunately, under the present Texas statutory scheme, upon hearing such evidence, the jury has no effective means to act upon such evidence and say "no" to the death penalty. As the Fifth Circuit cogently observed in Penry, under recent decisions of this Court, the Texas scheme should be reconsidered to give the jury a mechanism for meaningful consideration of mitigating evidence. Accordingly, Petitioner requests that the judgment of the Texas Court of Criminal Appeals be vacated or reversed and that this Court reconsider the Texas death penalty statute in light of its recent decisions in Sumner, Hitchcock, Eddings, and Skipper.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the petition for writ of certiorari be granted and the decision of the Texas Court of Criminal Appeals summarily reversed or, in the alternative, that this petition for writ of certiorari be granted and this case placed on the Court's docket for further consideration of the questions presented herein

Respectfully submitted,

HAYNES AND BOONE
3100 First RepublicBank Plaza
901 Main Street
Dallas, Texas 75202-3714
(214) 670-0550

W. Alan Wright
Counsel of Record

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for all parties to this action with a true and correct copy of the foregoing pleading by properly affixing the required postage on same and depositing it in the United States mail and sending it to the following addresses on the 21st day of December, 1987:

Gerald A. Goodwin, Esq.
Angelina County Courthouse
Lufkin, Texas 75901

Robert Huttash, Esq.
P.O. Box 12548
Capitol Station
Austin, Texas 78701

W. Alan Wright
W. Alan Wright

APPENDIX

2d/3701f

is in its implied finding that there is some "good cause shown," albeit not identified, for remanding this cause to the Austin Court of Appeals for "reconsideration in light of *Adams v. State* [707 S.W.2d 900 (Tex.Cr.App.1986)]." Since we first *granted* the petition for review in both cases the majority invites the reader to see, each is inapposite here.

While its judgment remands the cause to the trial court, the Austin Court of Appeals also found the evidence sufficient to sustain the verdict. As I do, the Austin Court will surely wonder what is the "good cause shown," and since presumably it must invite and afford time for the parties to brief the *Adams* question, the Austin Court would be justified in believing that to review the record again for prejudice to preparation of a defense is certainly *not* "in the interest of expediting a decision" in this cause.

In the premises it seems to me altogether more likely that this cause could be finally resolved in the trial court long before the appellate system releases it. But, like a "loose cannon on deck," the majority suspends rules *on its own motion* in order to grant discretionary review *on its own motion*, and then summarily remands the cause to the Austin Court of Appeals.

I dissent.

McCORMICK, J., joins.

Willie Mack MODDEN, Appellant,

v.

The STATE of Texas, Appellee.

No. 69447

Court of Criminal Appeals of Texas, En Banc.

Dec. 17, 1986.

Defendant was convicted of capital murder and sentenced to death in the 217th Judicial District Court, Angelina County, David V. Wilson, J., and he appealed. The Court of Criminal Appeals, Campbell, J., held that: (1) death qualification of jurors did not violate fair cross-section requirement; (2) exclusion of various members of jury panel was proper; (3) prosecutor's jury argument at sentencing phase was acceptable response to defense counsel's argument; and (4) defendant was not unfairly singled out to stand trial for capital murder while one accomplice was given immunity and the other pled guilty to aggravated robbery.

Affirmed.

Teague, J., concurred in judgment.

1. Jury ⇐33(2.1)

Death qualification of jury prior to guilt-innocence phase of bifurcated murder trial did not violate Sixth Amendment fair cross-section requirement or right to impartial jury. U.S.C.A. Const.Amend. 6.

2. Jury ⇐33(5.2)

Claim that venirepersons were erroneously excluded from murder jury for reason that prosecutor failed to ask whether they could set aside personal feelings opposing death penalty was waived by failure to object to exclusion for cause.

3. Jury ⇐108

Potential jurors in murder prosecution were not required to be given opportunity to set aside personal feelings opposing death penalty prior to being excluded for cause.

4. Criminal Law ⇐726

Closing argument by prosecutor in murder prosecution that jurors would never see defendant die if executed was proper response to defense attorney's argument referring to mode of execution. Vernon's Ann.Texas C.C.P. art. 37.071.

5. Criminal Law ⇐713

Proper jury argument must fall within summation of evidence, reasonable deduction from evidence, answer to argument of opposing counsel, or plea for law enforcement.

6. Jury ⇐33(2.1)

Striking for cause all but one of black members of jury panel, in murder prosecution, did not violate Sixth Amendment fair cross-section requirement in light of fact that venirepersons were challenged for cause by State for their inability to vote for imposition of death penalty under any circumstances. Vernon's Ann.Texas C.C.P. art. 35.16(b); U.S.C.A. Const.Amend. 6.

7. Jury ⇐33(5.2)

Failure to object to removal of venirepersons in murder prosecution waived any alleged error in striking for cause all but one of black members of jury panel.

8. Criminal Law ⇐1178

Failure by defendant to identify particular venirepersons alleged to have been improperly excluded caused claim of racial prejudice to be unsupported by record, thus presenting nothing for review.

9. Criminal Law ⇐37.10(2)

Capital murder defendant was not unfairly singled out due to one of accomplices being given immunity in exchange for testimony, and another pleading guilty to aggravated robbery and receiving 30-year sentence where accomplices waited in car outside service station while defendant entered station, committed robbery, and stabbed clerk to death.

J. Michael Askins, Lufkin, for appellant.

Gerald A. Goodwin, Dist. Atty. and Art Bauereiss, Asst. Dist. Atty., Lufkin, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

1. In cases where an indigent is sentenced to death, the great majority of briefs submitted by appointed counsel on appeal conform to the rules of appellate procedure and are quite helpful to this Court in resolving the issues raised. Unfortunately, the brief submitted in the instant case presents a striking exception. The points of error are multifarious, contain incomplete or no citations to the record, and fail to state an adequate legal basis upon which complaint is made. Briefs submitted to this Court must conform to the requirements of Tex.R.App.P. 74(d), and failure to do so may result in an order to amend or supplement a brief. See Tex.R.App.P. 74(h), (*o*).

OPINION

CAMPBELL, Judge.

Appeal is taken from a conviction for capital murder. V.T.C.A., Penal Code § 19.03(a)(2). After finding the appellant guilty, the jury returned affirmative findings to the special issues under Article 37.071, V.A.C.C.P. Punishment was assessed at death. We affirm.

The appellant was convicted of intentionally and knowingly causing the death of Deborah Davenport in the course of committing the offense of robbery. The appellant raises five points of error.[1] He challenges the denial of his motion in limine; the exclusion for cause of eleven prospective jurors; and the prosecutor's jury argument, at the punishment phase of the trial, with regard to the effect of the jury's answers to the special issues. The appellant also claims that the verdict in his case was the product of racial prejudice and unfairness.

Viewed in the light most favorable to the jury's verdict, the evidence showed that on July 29, 1984, the appellant, Leroy McGrew and Wilton Young drove to a self-service gasoline station in Lufkin. While McGrew and Young waited outside in the car, the appellant entered the station and robbed the clerk, Deborah Davenport. The appellant then stabbed Davenport with a knife, inflicting sixteen stab wounds, and fled from the store. Later that night, Davenport was taken to a local hospital, where she died of blood loss from the wounds she sustained in the attack.

[1] In his first point of error, the appellant contends that the trial court erred in overruling his "Motion in Liminie (sic) Regarding Death-Qualification of Jurors." In essence, the appellant argues that allowing

a "death qualified" jury to determine guilt or innocence violates the Sixth Amendment requirement that a jury must be taken from a fair cross-section of the community. This issue has been resolved adversely to the appellant's position in *Lockhart v. McCree*, 476 U.S. ——, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). In *McCree*, the Supreme Court held that death qualification of a jury prior to the guilt-innocence phase of a bifurcated trial does not violate the Sixth Amendment fair cross-section requirement or right to an impartial jury. Point of error one is overruled.

[2] In point of error two, the appellant claims that eleven members of the jury panel[2] were erroneously excluded for cause for the reason that the prosecutor failed to ask those venirepersons whether they could set aside their personal feelings opposing the death penalty, in violation of *McCree*, supra.

During the voir dire process, the trial judge excused for cause those venirepersons who stated that they could not under any circumstances vote for the imposition of the death penalty. See Article 35.16(b), V.A.C.C.P. The appellant complains of ten venirepersons who were excluded for this reason.[3] We note that the appellant objected to the removal of only one of these venirepersons. Since the appellant failed to object to the exclusion for cause of the other nine venire members, he has waived any error with regard to the trial court's actions as to those nine persons. *Guzmon v. State*, 697 S.W.2d 404 (Tex.Cr.App.1985), cert. denied, — U.S. ——, 106 S.Ct. 1479, 89 L.Ed.2d 734 (1986); *Stewart v. State*, 686 S.W.2d 118 (Tex.Cr.App.1984). However, we will address his point of error regarding Margie Nell Kimble, the one venireperson to whose removal the appellant did object.

[3] The appellant argues that *McCree* stands for the proposition that a potential juror must be given the opportunity to set aside his personal feelings opposing the death penalty before being excluded for cause. We believe the appellant has misconstrued the holding in *McCree*. *McCree* held that the Constitution does not "prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial." 476 U.S. at ——, 106 S.Ct. at 1760, 90 L.Ed.2d at 142. Point of error two is overruled.

[4] In his third point of error, the appellant complains of the following jury argument, which was made by the prosecutor at the sentencing phase of the trial.

> You answer the questions. You are following the law. You don't say anything about anything, except if these questions are right or wrong. Are they "yes" or "no"? What happens to him after that, you will never see him. You will never be in a position to see him die, nor will you ever be in the comparable position of plunging a needle into him or stabbing him over and over and over. You're not going to ever get to the point where Willie Mack was. You will never get to that point. You didn't even, you didn't even answer these questions. You didn't do that. The facts and acts as they were committed answered these questions.

Although no objection was made to the prosecutor's argument, the appellant argues that "it [the argument] was of such proportions that a timely objection would not have removed it from the minds of the jurors...." Relying on *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the appellant contends that this argument effectively minimized the jury's sense of responsibility for its role in the sentencing process.

2. This point of error is multifarious and therefore fails to preserve anything for review. See *Euziere v. State*, 648 S.W.2d 700 (Tex.Cr.App. 1983). Nonetheless, we will address the appellant's contentions because the penalty of death was assessed in this case.

3. While the appellant complains of eleven jury panel members as being excluded for cause, the record reflects that one of these venirepersons, Rachel Oliver, was struck by the State with the use of a peremptory challenge.

The State contends that the prosecutor's argument to the jury was made in response to the argument of the appellant's counsel. During his closing argument on punishment, the appellant's attorney made the following statement to the jury:

> You and you alone can send Willie Mack Modden to lethal injection. There can be no division of responsibility. You can never say that the rest overpowered you individually. In your individual capacity as a juror, it must be your deliberate, cool, premeditated act. It takes your vote.

In *Caldwell*, the prosecutor, in response to a defense attorney's argument which sought to impress upon the jury the enormity of their decision, responded that the death penalty verdict was not the final decision and would be automatically reviewed by the state supreme court. The United States Supreme Court held that it was impermissible to rest a death sentence on a determination made by a jury that had been advised that the responsibility for determining the propriety of the sentence rested elsewhere.

Unlike the argument in *Caldwell*, the argument in the instant case did not invite the jurors to shift the responsibility of determining the appropriateness of a death penalty verdict to an appellate court. Instead, the prosecutor's remarks constituted a correct description of the jury's role in the sentencing process. See Article 37.071, V.A.C.C.P.

[5] Proper jury argument must fall within at least one of the following four areas: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to argument of opposing counsel or (4) plea for law enforcement. *Alejandro v. State*, 493 S.W.2d 230 (Tex.Cr.App.1973); see also *Good v. State*, 723 S.W.2d 734 (Tex. Cr.App.1986).

The prosecutor implicitly argued that the jury did not need to answer the special issues because the appellant's conduct in the commission of the murder figuratively answered them. We find that the prosecutor's statement was an acceptable response to the argument of opposing counsel. To the extent that it served to remind the jury of its role in the sentencing process, the argument was also a proper plea for law enforcement. Finally, the argument was a reasonable deduction from the evidence. Hence, the argument falls within the permissible areas of jury argument. Point of error three is overruled.

[6] In his fourth point of error, the appellant claims error in the trial court's alleged failure "to protect the rights of the [appellant] from the inherent racial prejudice existing in this community against a black person defendant and a white person victim." Specifically, the appellant argues that the trial judge erred in striking *for cause* all but one of the black members of the jury panel, thus violating the Sixth Amendment fair cross-section requirement.[4]

The record indicates that fourteen members of the jury panel were excused following challenges for cause by the State. Each of these venirepersons stated that he or she would be unable to vote for the imposition of the death penalty under any circumstances. Hence, their removal for cause was proper under Article 35.16(b), V.A.C.C.P.; see also *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

[7] As we pointed out previously, the appellant objected to the removal of only one of these fourteen venirepersons, leaving thirteen members of the panel who were excused for cause without any objection from the appellant. Failure to object to the exclusion of venirepersons waives any alleged error, and such exclusion can not be considered on appeal. *Hawkins v. State*, 660 S.W.2d 65 (Tex.Cr.App.1983); *Burks v. State*, 583 S.W.2d 389 (Tex.Cr. App.1979).

4. The appellant does not allege that the State exercised its *peremptory strikes* in a racially discriminatory manner. See *Batson v. Kentucky*, 476 U.S. ——, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

[8] Furthermore, the appellant does not identify the particular venirepersons claims were improperly excluded. Hence, the appellant's claim of racial prejudice is unsupported by the record, is merely conclusory, and presents nothing for review. See *Reyes v. State*, 647 S.W.2d 255 (Tex.Cr.App.1983); see also *Holloway v. State*, 666 S.W.2d 104 (Tex.Cr.App.1984); Tex.R.App.P. 74(d). The fourth point of error is overruled.

[9] In his fifth point of error, the appellant complains that "the trial court committed a fundamental error in this case due to the totality of circumstances beyond the control of the [appellant] and/or his attorneys resulting in an extremely unfair verdict having been rendered in this case." [5]

As we understand the appellant's argument, he contends that he was unfairly singled out to stand trial for capital murder, while one of his accomplices was given immunity in exchange for his testimony, and the other pled guilty to aggravated robbery and received a thirty-year sentence.

The evidence shows, however, that McGrew and Young waited in the car outside the service station while the appellant entered the station, committed the robbery, and stabbed the clerk to death. In his testimony at the punishment phase of the trial, the appellant admitted that he anticipated killing someone before the robbery commenced and that he inflicted the knife wounds that caused her death. Notwithstanding the fact that McGrew and Young were accomplices, the evidence is overwhelming that the appellant was the primary actor and that he contemplated the taking of a life. See *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); see also *Streetman v. State*, 698 S.W.2d 132 (Tex.Cr.App.1985). Point of error five is overruled.

5. As we pointed out in note 1, supra, this contention fails to state any legal basis for the appellant's broad claim that the verdict in his case was "unfair."

6. We do not express any opinion as to the appropriateness of a "frivolous appeal brief" in a capital case where the punishment was assessed at death.

7. See our discussion of Point of error one at pages 860-61 of this opinion.

The appellant's co-counsel in this cause has also filed a brief, in which he describes this appeal as "frivolous" and sets forth two "arguable [points] of error." [6]

The first "arguable [point] of error" is essentially a restatement of the appellant's point of error one, regarding the denial of the appellant's motion in limine. We have addressed this contention [7] and find it to be without merit. This point is overruled.

The second "arguable [point] of error" complains that the trial court failed to include, in the charge to the jury at punishment, an instruction concerning intoxication as a factor to be considered in mitigation of punishment. Upon an examination of the jury charge at the sentencing phase, we find that the trial court included this instruction in the form requested by the appellant. (R. XXVI-2773). This point is overruled.

The appellant has filed a pro se brief in this appeal. Although he is not entitled to hybrid representation, see *Stephen v. State*, 677 S.W.2d 42, 45 (Tex.Cr.App.1984), in the interest of justice we have reviewed the brief and find the contentions therein to be without merit.

Having considered the appellant's points of error and finding no reversible error, we affirm the judgment of the trial court.

Given the posture of this cause at this time, the only issues presented on behalf of appellant, and this Court's resolution of those issues, TEAGUE, J., is constrained to join the judgment of the Court.

WHITE, J. not participating.

291. —— Review, instructions, punishment

Record failed to show that the trial court's reading of the punishment charge to the jury after the argument of counsel in any way injured appellant or otherwise operated to prevent her from receiving a fair and impartial trial. Mitchell v. State (App.1983) 649 S.W.2d 106.

Art. 37.071. Procedure in capital case

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on or is unable to answer any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) If a defendant is convicted of an offense under Section 19.03(a)(6), Penal Code, the court shall submit the three issues under Subsection (b) of this article only with regard to the conduct of the defendant in murdering the deceased individual first named in the indictment.

(g) The court, the attorney for the state, or the attorney for the defendant may not inform a juror or a prospective juror of the effect of failure of the jury to agree on an issue submitted under this article.

(h) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

Subsec. (e) amended by Acts 1981, 67th Leg., p. 2673, ch. 725, § 1, eff. Aug. 31, 1981. Amended by Acts 1985, 69th Leg., ch. 44, § 2, eff. Sept. 1, 1985.

Section 3 of the 1985 amendatory act provides:

"(a) The change in law made by this Act applies only to the punishment for an offense committed on or after the effective date of this Act. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

"(b) An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for this purpose."

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